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May 19, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: October 29, 2004

Case No.: TIA-0299

XXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Applicant did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the Appeal should be granted.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004) (the Authorization Act). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Applicant was employed as an electronics technician at the Pantex plant (the plant). He worked at the plant for approximately 36 years, from 1961 to 1997.

The Applicant filed an application with OWA, requesting physician panel review of his kidney damage and deafness. The Applicant claimed that these conditions were due to exposures to toxic and hazardous materials at the plant.

The OWA referred the matter to the Physician Panel, which issued a negative determination for the claimed illnesses. The Panel unanimously found that the Applicant's kidney disease, polycystic renal disease, was a congenital malformation and not related to exposure to a toxic substance. The Panel opinion on the hearing loss was not unanimous. All three members agreed that exposure to solvents can cause hearing loss. They disagreed, however, on whether the Applicant's hearing loss was caused by exposure to

solvents. The two-member majority distinguished the Applicant's hearing loss, stating that solvent-induced hearing loss is "usually" more pronounced in a certain range. The two members also stated that they saw no documentation of significant solvent exposure. The third member disagreed, finding that the Applicant's pattern of hearing loss was consistent with solvent-induced hearing loss and that there was sufficient evidence of solvent exposure.

The OWA accepted the Physician Panel's determination on both illnesses. The Applicant filed the instant appeal.

In his appeal, the Applicant alleges that (i) his records were destroyed and, (ii) he was exposed to many toxic substances.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Applicant's argument that he was exposed to toxic substances does not indicate Panel error on the claimed kidney disease. Because the Panel found that polycystic renal disease is congenital and not related to toxic exposures, the level of his exposures is irrelevant. Accordingly, his argument about undocumented exposures, even if correct, does not indicate Panel error on the claimed kidney illness.

On the other hand, we find Panel error on the hearing loss claim. The Rule required that the Panel explain the basis of its finding. 10 C.F.R. § 852.12(b)(5). The majority and minority clearly disagreed on whether the Applicant's pattern of hearing loss was consistent with solvent-induced hearing loss and whether the Applicant had significant solvent exposure. In such a case, it was incumbent upon the Panel to clearly explain the basis for the divergent views. In the absence of such an explanation, the application warrants reconsideration. In this regard, we note

that the record contains evidence of solvent exposure. See OWA Record at 226, 230, 252. There may be additional evidence of solvent exposures in the record; some of the pages in the record are illegible and, therefore, the original submissions should be reviewed.

As the foregoing indicates, the appeal should be granted. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's granting of this appeal does not purport to dispose of the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0299, be, and hereby is, granted.
- (2) The Physician Panel Report did not adequately explain the basis of its determination. Reconsideration of the Applicant's hearing loss claim is in order.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 19, 2005